Supreme Court, U.S.
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No. 91-1877

IN THE

Supreme Court of the United States

OCTOBER 1991 TERM

THE STATE OF COLORADO, by and through the Colorado State Claims Board of the Division of Risk Management,
Plaintiff-Appellee,

v.

YVONNE E. DEFOOR, FRANK BOWEN; MARGIE BOWEN; ELINOR M. BUTENHOFF; URS FREI; MICHAEL HATTON; THE ESTATE OF ANNA HAYES, Deceased; THE CHILDREN AND ESTATE OF ARLENE JOHNSON, Deceased; ESTATE OF JOHN KILLEEN, Deceased; ESTATE OF MARKUS LANG, HERBERT LAND, as survivor, heir and personal representative of Markus Lang, and THE ESTATE OF MARKUS LANG, RITA LAND, as survivor, heir and personal representative of Markus Lang and THE ESTATE OF MARKUS LANG, and ELFRIEDE BORRILLO, as Special Administrator of the Estate of Markus Lang; THE ESTATE OF DOUGLAS MACKENZIE, Deceased; SUZANNE MACKENZIE; MICHAEL MCGARVEY, NANCY MCGARVEY; BERNADINE M. REMMERS; CAROL J. SMITH, THOMAS C. SMITH, and MEAGAN N. SMITH, a minor; THE ESTATE OF GLADYS STEWART, Deceased; THE ESTATE OF SOL STEWART, Deceased; THE CHILDREN AND ESTATE OF KEITH WALTERS, Deceased; THE CHILDREN AND ESTATE OF KATHLEEN WALTERS, Deceased; HOROSHI YOSHIOKA; MORDEKHAY FUMISHIKA; MASHASIKI NAKAYAMA; MIKAYŌ TAJIMA; and RODNEY ALVA WEST; and CLARENDON NATIONAL INSURANCE COMPANY; SAN JUAN TOURS, INC., d/b/a GRAY LINE TOURS; and all persons or

continued

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entities suffering, or claiming to suffer, damages resultant from the August 10, 1987, collision between a boulder and a Gray Line Tour Bus on U.S. Highway 40, about seven miles east of Winter Park, Colorado, while the bus was on Berthoud Pass,

Defendants-Appellants,

v.

THE COLORADO DEPARTMENT OF HIGHWAYS and THE COLORADO DIVISION OF HIGHWAYS, PHILLIP PACHECO, EARMAN PACHECO, MERLE ZIMER, PHILLIP WEST, ROSS HAMILTON, EDWARD FINK, JOHN M. SALAZAR, R.L. CLEVENGER, DWIGHT BOWER, PHIL MCCULLOUGH, and LOWELL JACKSON,

Third-Party Defendants and Counter Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO REPLY BRIEF

Alan Epstein
David R. Brougham
of HALL & EVANS
1200 - 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3300

Attorneys for Third-Party Defendants and Counter Defendants-Appellees,
Phillip Pacheco, Earman Pacheco, Merle Zimer, Phillip West, Ross Hamilton, Edward Fink, John M. Salazar, R.L. Clevenger, Dwight Bower, Phil McCullough, and Lowell Jackson

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STATUTES AND OTHER AUTHORITIES

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JURISDICTION

This Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. §1257. Respondents contest such jurisdiction in their response opposing any grant of certiorari. For the reasons set forth herein, the question of federal law decided by the Colorado Supreme Court challenged by the petition is final and jurisdiction exists in the Court to review that decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves 42 U.S.C. §1983:

> **Civil Action for Deprivation of Rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Also involved, following the challenge to jurisdiction by respondents, is 28 U.S.C. §1257:

> **State Courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question

on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF RELATED CASES

On May 26, 1992, the respondents herein filed a petition seeking a writ of certiorari in Case No. 92-1922, relative to the same Colorado Supreme Court decision challenged by this petition, requesting review of the determination by the Colorado Supreme Court that §24-10-114(1), 10A C.R.S. (1988) was constitutional.

BASIS FOR REPLY

A. Clear precedent supports the finality of the Colorado Supreme Court order for purposes of a certiorari petition and jurisdiction exists to grant the requested writ

B. The Colorado Supreme Court was wrong in determining as a threshold matter that an injured highway accident victim may state a federal civil rights claim against individual state employees for violation of an implied federal duty of care toward all those impacted by state activities.

ARGUMENT

A. CLEAR PRECEDENT SUPPORTS THE FINALITY OF THE COLORADO SUPREME COURT ORDER FOR PURPOSES OF A CERTIORARI PETITION AND JURISDICTION EXISTS TO GRANT THE REQUESTED WRIT

Commencing with the decision announced in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed 2d 328 (1975), this Court has recognized the critical importance of pragmatic analysis in the determination of "finality" for purposes of asserting certiorari jurisdiction over state courts. To effectuate decisions respecting the issue, *Cox Broadcasting* established four categories of cases where finality exists for purposes of certiorari jurisdiction under 28 U.S.C. §1257, even where issues remain to be resolved in such cases. At least two of the *Cox Broadcasting* categories apply to the Colorado Supreme Court decision in this case.

Cox Broadcasting first recognizes as final that category of cases where the highest state court decides a federal issue in conclusive fashion and preordains the outcome of any further proceedings in the state court. The instant case fits category one because any future Colorado state court proceedings will not consider further the threshold issue raised by petitioners at the outset of this matter: i. e., whether claimants could ever state a damages cause of action under the federal civil rights law arising out of a disastrous highway accident. The remand ordered by the Colorado Supreme Court in the case will permit no further visitation of this issue in the lower Colorado courts, while it will remain the law of the case on any future review. Only a reversal of the state court conclusion on the issue by this Court will alter the outcome as to this federal question in any fashion. Further, such a reversal would also eliminate any further proceedings with respect to this federal question in the state courts.

This case is much like *Asarco, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). As in that case, there will

be no further trial court consideration of the threshold federal question raised by petitioners and the course of further trial court proceedings is preordained in this regard. The decision is also analogous to *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988). Like the Mississippi Supreme Court, Colorados's high court has already answered the critical federal question—whether a federal civil rights duty to the public exists for individual state employees engaged in roadway maintenance operations—and the judgment on this issue is now ripe for review. *Mississippi Power & Light, Id.*, 108 S.Ct. at 2438, n. 11.

Cox Broadcasting further recognizes as final that category of case where the state's highest court pronouncement necessitates further proceedings in which a petitioning party may prevail on nonfederal grounds, rendering federal review unnecessary, and where a refusal to review on certiorari may erode federal policy. *Cox Broadcasting, supra*, 95 S.Ct. at 1040. In such cases, certiorari may be granted to eliminate the prospect that an unreviewed and unreviewable state court decision might cause serious erosion in a federal policy respecting an important federal issue. The instant situation compares in favorable respects to both *Asarco, supra* and *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 100 L.Ed.2d. 158 (1988) with regard to such finality.

As in both such cases, the federal issue presented to the Court through this petition will not be revisited on remand at the trial level in the state court. However, multiple other issues remain for determination by the trial court and numerous opportunities to prevail exist for petitioners before that court. In addition, the unprecedented nature of the Colorado Supreme Court civil rights duty pronouncement contested by this petition establishes the substantial federal policy erosion potential existent in this case, should no review of the state court opinion occur.

Because it involves federal civil rights claims against individual public entity employees, this case possesses an additional element of significance, not present in other decisions respecting the exercise of certiorari jurisdiction by this Court. *Mitchell v.*

Forsythe, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) assures the state employees named defendants here that any adverse pretrial decision respecting their qualified immunity to any civil rights claims asserted against them may be reviewed on an interlocutory basis. The Colorado high court has ordered this matter back to the trial court without requiring a further articulation of the basis for civil rights claims and in the absence of any precedent establishing that any constitutional right may be violated in the course of a roadway accident. This decision jeopardizes the immunity protection acknowledged in *Mitchell v. Forsythe* and only the exercise of certiorari jurisdiction will permit correction of the error made by the Colorado Supreme Court.

Absent any indication that petitioners may again argue the invalidity of claims against them to any Colorado appellate authority, or obtain any interlocutory review of a decision denying them qualified immunity from the claims asserted against them, the 'finality' of the Colorado Supreme Court order becomes even more apparent. In determining that *any* prospect existed to establish a federal civil rights claim against the petitioners, the Colorado high court effectively relegated them to a full blown trial on all issues prior to any further review by a state appeals court. Such an outcome defies the specific directive of *Mitchell v. Forsythe*, in that it precludes immunity from the expense and anxiety of trial preparation, even if allowing an immunity to judgments.

This Court's decisions in *Cox Broadcasting, Asarco, Mississippi Power & Light*, and *Goodyear Atomic Corp.* all establish the parameters for the analysis of 'finality' under 28 U.S.C. §1257. Applying such principles to the instant petition results in a demonstration that 'finality' exists in the Colorado Supreme Court order at issue and in the propriety of a jurisdictional exercise under the statute with respect to the instant petition.

B. THE COLORADO SUPREME COURT WAS WRONG IN DETERMINING AS A THRESHOLD MATTER THAT AN INJURED HIGHWAY ACCIDENT VICTIM MAY STATE A FEDERAL CIVIL RIGHTS CLAIM AGAINST INDIVIDUAL STATE EMPLOYEES FOR VIOLATION OF AN IMPLIED FEDERAL DUTY OF CARE TOWARD ALL THOSE IMPACTED BY STATE ACTIVITIES

The unanimous decision of this Court in *Collins v. City of Harker Heights, Texas*, ___ U.S. ___, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) reiterates the essential processes required whenever a federal civil rights claim is analyzed. There, the Court established as the first, critical decision point whether the facts alleged by a complaint could suffice to state a violation of protected rights, whatever other circumstances might apply. Similarly, in *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789, ___L.Ed.2d ___ (1991), the Court recognized as mandatory allegations establishing a violation of a "clearly established constitutional right" in a civil rights complaint. Respondents satisfied neither requirement and the failure of the Colorado high court to recognize such fatal deficiencies on review demonstrates the necessity for certiorari.

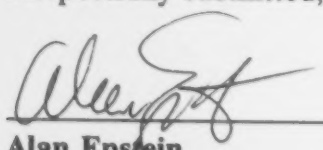
Respondents seek judicial recognition for the proposition that public employees owe a federal constitutional duty to provide members of the public at large with a certain, unspecified, minimal level of safety and security on a highway. In this sense, the matter is a direct, though more expansive, parallel to the factual circumstances in *Collins, infra*, (public entity duty to public employees) and *Siegert, infra*, (public employee supervisor duty to public employees). In neither case was this Court willing to acknowledge any claimed Constitutional duty and respondents offer nothing to support their claim that this case presents a distinguishable circumstance.

Even accepting the allegations respecting motive, intent and purpose as found in the claims of respondents, nothing supports the conclusion that these facts may be differentiated

from an ordinary intentional tort claim under state law. Moreover, respondents offer no previous controlling decision as demonstrating the "clearly established" character of the responsibility they seek to impose upon petitioners. For both such reasons, the Colorado Supreme Court is incorrect that a federal civil rights claim was stated by respondents and the decision to remand the matter for further proceedings was in direct conflict with *Collins, infra*, and *Siegert, infra*, among other decisions of the Court. Because respondents offer no viable support for the Colorado high court decision, certiorari is required to rectify the mistakes made in that decision and to reiterate the demarcation between state tort and federal civil rights claims.

Dated this 31st day of October, 1992.

Respectfully submitted,



Alan Epstein
David R. Brougham
of HALL & EVANS
1200 - 17th Street
Suite 1700
Denver, Colorado 80202
(303) 628-3300

Attorneys for Third-Party Defendants and Counter Defendants-Appellees,
Phillip Pacheco,
Earman Pacheco, Merle Zimer,
Phillip West, Ross Hamilton,
Edward Fink, John M. Salazar,
R.L. Clevenger, Dwight Bower,
Phil McCullough,
and Lowell Jackson

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 1992 a true and correct copy of the foregoing ***REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO*** was mailed by placing the same in the United States Mail, postage prepaid, addressed as follows:

Leland P. Anderson, Esq.
Sears, Anderson & Swanson, P.C.
Denver Centerpoint, Suite 810
3900 E. Mexico Avenue
Denver, Colorado 80210

Victoria C. Swanson, Esq.
Sears, Anderson & Swanson, P.C.
2 North Cascade Avenue, Suite 1250
Colorado Springs, Colorado 80903

Thomas L. Roberts, Esq.
Mark P. Martens, Esq.
Pryor, Carney & Johnson
6200 South Syracuse Way, Suite 400
P.O. Box 6559
Englewood, Colorado 80155-6559

William L. Keating, Esq.
David Struthers, Esq.
Fogel, Keating & Wagner
1199 Bannock Street
Denver, Colorado 80204

H. Paul Himes, Esq.
Aisenberg & Kaplan
1600 Broadway, Suite 2000
Denver, Colorado 80202

Gregg E. Kay, Esq.
First Assistant Attorney General
Office of the Attorney General
Tort Litigation Section
110 - 16th Street, Tenth Floor
Denver, Colorado 80202

Eugene Sprague, Esq.
Eason, Sprague & Wilson
1625 Broadway, #900
Denver, Colorado 80202-4709

Yvonne DeFoor
c/o Colorado Public Justice Foundation
Attn: Arthur Pina
P.O. Box 37311
Denver, Colorado 80237

Dennis H. Mark
Colorado Trial Lawyers Association
1600 Stout Street, #1300
Denver, Colorado 80202

Michael C. Maher
1050 31st Street, N.W.
Washington, D.C. 20007

John Gelhausen
1888 Sherman Street, #370
Denver, Colorado 80203

J. Kent Miller
Miller & McCarren
370 - 17th Street, #3050
Denver, Colorado 80202

Daniel S. Hoffman
Boyd N. Boland
Holme, Roberts & Owen
1700 Lincoln, #4100
Denver, Colorado 80203

Frederic K. Conover, II
Faegre & Benson
370 - 17th Street, #2500
Denver, Colorado 80202

Kathleen E. Haddock
Colorado Municipal League
1660 Lincoln Street, #2100
Denver, Colorado 80264

Susan K. Griffiths
Tami A. Tanoue
Elizabeth E. Salkind
Griffiths & Tanoue
Blake Street Terrace
1860 Blake Street, #550
Denver, Colorado 80202

Mac V. Danford
Clerk, Colorado Supreme Court
2 East 14th
Denver, Colorado 80203

